Religious Liberties

The State of Blaine: A Closer Look at the Blaine Amendments and Their Modern Application

*By Meir Katz**

Governments aid religious organizations in a wide variety of ways. For example, governments provide vouchers that students can use to attend private schools, support religious organizations that provide social services to the needy, and provide funding to ensure that religious houses of worship are safe from attack by terrorists and accessible to the handicapped. All of these programs, and many more, are permissible under the Establishment Clause of the Federal Constitution. The Establishment Clause requires only that government programs have a predominant secular purpose and do not improperly advance religion.

But many of these programs have been struck down under state "Blaine Amendments." Written during the 1800s in a period of tremendous religious strife, Blaine Amendments appear in forty state constitutions.[1] Although their scope and phraseology varies widely, they generally impose a per se bar against government funding to a "religious sect or denomination" or for any "sectarian" purpose. Some apply only in the context of education, barring all funding to religious schools even if the funding has a secular purpose and is provided on a religion-neutral basis. Many impose a bar against *all* funding to religious and faith-based organizations, again regardless of the secular purpose for the proposed arrangement. And despite the growing chorus of scholars who question their constitutionality, the Blaine Amendments are very much a part of the contemporary legal fabric.[2]

This article explores the important role that the Blaine Amendments play in deciding modern church-state legal questions. Part I takes a brief look at the colorful history of the Blaine Amendments, describing their discriminatory intent and enforcement. Part II then describes modern applications of the Blaine Amendments and shows why many people of faith find them a significant barrier to diversity in our ostensibly pluralistic society. Part III considers questions regarding the constitutionality of the Blaine Amendments as well as recent efforts to repeal them.

I. A Short History of the Blaine Amendments

The Blaine Amendments have a dark and unfortunate history. As the Supreme Court has explained, they "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general."[3] They were both adopted on the basis of anti-Catholic animus and enforced in a discriminatory fashion.

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A. The Genesis of the Blaine Amendments

The Blaine Amendments are one unfortunate chapter in a long story of hatred and bigotry in nineteenth century America. Xenophobia and nativism, the forces that motivated the Blaine Amendments, are threads in American history that tend to come loose at certain times and recede into the larger cultural fabric at others. In the late nineteenth century, the thread came loose in a very significant manner to the detriment of the Catholic community as well as the broader religious community.

Irish Catholic immigration to the United States in the 1840s and 1850s was tremendous both in volume and in its long-term effects on American society. At the time, much of Ireland's population was heavily dependent on the potato crop. In the Great Famine of the 1840s, the potato crop failed repeatedly causing severe starvation and massive emigration.[4] Indeed, 13.9% of Ireland's population emigrated to the United States in the 1850s; the U.S. welcomed over one million new Irish immigrants between the years 1845 and 1850 alone.[5] Once in America, the Irish immigrants ghettoized and remained largely unemployed. Many of their neighborhoods quickly became slums and their new neighbors came to see them as a menace.[6]

At around the same time that Irish immigrants were flooding the northeast corridor, the American public school system, still in its infancy, was decidedly religious. It taught nondenominational Protestantism with a very heavy emphasis on morality (as understood by Protestants) and the role of individual choice in matters of religious doctrine. Teachers lead students in prayer, taught moral values derived from Protestant teaching, and read from the King James Bible.[7] Horace Mann, renowned as a great educational reformer and often referred to as "the father of public education," advanced a "vague and inclusive Protestantism" and promoted daily reading of the Bible (that is, the King James Bible) without commentary.[8] The lack of explicit religious commentary in the context of Bible reading was largely supplemented by the virtually ubiquitous use of the McGuffey Readers. In addition to teaching the "three r's," the McGuffey Readers also taught Protestant values and were highly offensive to Catholics and Jews, among others.[9] They were used by some 200 million school children between the years 1900 through 1940 and variations thereof persisted until 1960.[10] While the prevalence of devotional activities in the common schools may have ebbed and flowed, as late as 1950 (just thirteen years before the Supreme Court's *Schempp* decision, ruling government-led public school prayer unconstitutional[11]) over half the states either required or permitted Bible reading in the common schools.[12]

The Catholic Church responded by seeking government support for its schools on equal terms with the Protestant public schools. It argued that if state dollars were going to fund

Protestant "common" schools, state dollars should similarly go to fund Catholic "parochial" schools. This argument was met with tremendous resistance. Over time, largely as a result of the rhetoric generated by the resistance, the Protestant public schools would become synonymous with Americanism and republicanism, the Catholic schools with foreign influence and rigid adherence to monarchal authority. Additionally, the Catholic Church attempted to reform public education as an alternative to government funding. The reform efforts were attacked as an attempt to destroy public education in the United States (a tactic familiar to the ears of education reformers to this day).[13]

Fear of Catholic control of the public schools proved a great motivator for political organization. From 1853 through 1856, the fastest growing political organization was the anti-Catholic "Know-Nothing" movement, which later formed the American Party. Members of the American Party were sworn to do everything in their power to "remove all foreigners, aliens, or Roman Catholics from office" and to refrain from appointing Catholics to positions of power.[14] (The American Party's use of oaths to stifle Catholic growth would become a model for other political organizations in the years to come.[15]) In 1855, the Know-Nothings had tremendous success in local, congressional, and state elections in New York, Massachusetts, and Pennsylvania.[16] And in the 1856 presidential election, the American party's candidate, former President Millard Fillmore, received 21% of the popular vote, an impressive performance for a third-party.[17]

In 1860, following the election of President Lincoln, the American Party was subsumed into the larger Republican Party. The Republicans actively recruited American Party voters by appealing to nativist and anti-Catholic sentiment. The new nativist element of the Republican Party, which was to be the dominant party in American politics for the next fifty years, brought about the proposed Federal Blaine Amendment and numerous state Blaine Amendments throughout that period.

In 1875, President Grant, who was hardly immune to the xenophobia that overtook American society,[18] requested an amendment to the federal constitution that would prohibit the grant of any school funds to the benefit of "sectarian" organizations.[19] During his final annual message to Congress, Grant spoke of the "importance that all [men] should be possessed of education and intelligence" as a vehicle to prevent ignorant men from "sink[ing] into acquiescence to the will of intelligence, whether directed by the *demagogue* or by *priestcraft*."[20] His solution, intended to ensure the proper education of all men, was a constitutional amendment that would require "each of the several States to establish and forever maintain free public schools adequate to the education of all of the children" and would also prohibit the use of "any school funds, or school taxes . . . for the benefit of or in aid . . . of any religious *sect* or *denomination*."[21] The italicized words were chosen carefully and were understood by his contemporaries as a reference to the Catholic Church. It was, after all, an "open secret that [the word] 'sectarian' was code for 'Catholic.'"[22]

One week to the day later, James G. Blaine, the Speaker of the House of Representatives, introduced that amendment—the Blaine Amendment. It sailed through the House by a vote of 180-7 but failed to achieve the necessary two-thirds majority in the Senate.[23] The Senate debates clearly demonstrate the anti-Catholic intent behind the Blaine Amendment and its supporters:

> [T]here is a large and growing class of people in this country who are utterly opposed to our present system of common schools . . . . The liberty of conscience, while it is universal in every church but one, is not a liberty of conscience to stand in the way of [the development of public highways and common schools] . . . . The supposed infallibility of the Holy Father would be a sufficient refutation of the suggestion [that the Catholic Church advances religious liberty], for it is the greatest maxim of the executive affairs in that hierarchy, *semper eadem—it n*ever changes . . . . [T]hese dogmas [of intolerance] . . . are at this moment the earnest, effective, active dogmas of the most powerful religious sect that the world has ever known, or probably ever will know—a church that is universal, ubiquitous, aggressive, restless, and untiring.[24]

And consider this response, also articulated on the floor of the U.S. Senate, in opposition thereto:

> I think I know the motive and the animus which have prompted all this thing. I do not believe it is because of a great devotion to the principles of religious liberty. That great idea which is now moving the modern world is used merely as a cloak for the most unworthy partisan motives. . . . [T]hese gentleman [who support the Blaine Amendment] knowing . . . that "the bloody shirt" can no longer call out the mad bull, another animal has to be brought forth by these matadors to engage the attention of the people . . . . The Pope, the old Pope of Rome, is to be the great bull that we are all to attack.[25]

Although the Federal Blaine Amendment ultimately failed, it had a lasting legacy. Blaine and his supporters turned to state legislatures, many of which passed constitutional amendments barring aid to "sectarian" (i.e., Catholic) institutions.[26] Additionally, many other states were required to adopt a Blaine Amendment as a condition of being admitted to the Union. Ultimately forty-one states adopted Blaine Amendments, and virtually all were adopted between 1870 and 1900 as anti-Catholic nativism swept across the country.[27]

B. The Discriminatory Enforcement of the Blaine Amendments

Blaine Amendments were not simply grounded in anti-Catholic animus, they were also initially enforced in a discriminatory fashion. Litigation over the exclusive use of the King James Bible in the public schools provides a good illustration.

As noted above, public schools in the nineteenth century were largely Protestant institutions. They often required daily Bible reading, typically without commentary from a teacher or other school personnel. The Bible of choice was the King James Bible (to the exclusion of the Douay version (preferred by Catholics), for example); students who objected to the use of the King James Bible were generally not permitted to use a different translation of the Bible, or any other book, of their

choice. This phenomenon continued into the early twentieth century and was then frequently the subject of litigation. The question posed to state courts was whether their Blaine Amendments prohibited the exclusive use of the King James Bible. If the Blaine Amendments were an embodiment of the principle of separation of church and state (as proponents argued), the exclusive use of a single and religiously-divisive text should have been prohibited. Yet, nearly all states that adjudicated the question interpreted their Blaine Amendment to permit the exclusive use of the King James Bible in the public schools.

Among those states that permitted the exclusive use of the King James Bible were Michigan (1898),[28] Nebraska (1903),[29] Kansas (1904),[30] Kentucky (1905),[31] Texas (1908),[32] Georgia (1922),[33] California (1924),[34] Minnesota (1927),[35] and Colorado (1927).[36] Generally, they reasoned that the King James Bible was not "sectarian" because it is merely a translation of the Bible, which is not a work that "teaches the peculiar dogmas of a [particular] sect" or denomination.[37] Perhaps these courts failed to appreciate the interpretive power of translation because they found the interpretation inoffensive.

Wisconsin was one of perhaps just two states that found the exclusive use of the King James Bible unconstitutional.[38] That court defined the word "sectarian" (as it appears in the Blaine Amendment) to refer to doctrines that are believed by some religious denominations and rejected by others. It found the King James Bible to be "sectarian" but held that texts that "teach existence of a supreme being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, [are] not sectarian."[39] Of course, there *are* religious (or moral) traditions that do not believe in the existence of a singular supreme being of infinite wisdom, power, and goodness. While the court did not address those traditions explicitly, it appears that even Wisconsin, which struck the exclusive use of the King James Bible, read the Blaine Amendment to discriminate against certain minority traditions. Indeed, with the sole exception of Illinois, every state to address the application of the Blaine Amendments to the King James Bible found that the Blaine Amendments permit some form of religious indoctrination in the public schools.[40]

Early enforcement of the Blaine Amendments confirms their discriminatory nature. They were designed to entrench the Protestant majority and suppress the "sectarian" minority. The use of the word "sectarian" is itself instructive. No majority religion is "sectarian"; it is a word that refers, usually pejoratively, to insular minority faith traditions. Thus, a rule barring funding to sectarian organizations permits the preferences of the majority to persist at the expense of the minority. Given the history of the adoption of the Blaine Amendments, this result was probably intended. It is no surprise that the Supreme Court in 2000 condemned the doctrine of sectarianism embodied by the Blaine Amendments in the strongest possible terms: they have a "shameful pedigree," were "born of bigotry," and "should be buried now."[41]

II. Modern Applications of the Blaine Amendments

The Blaine Amendments are not simply an historical relic. They continue today to place significant limits on some religious liberties. The Establishment Clause, as has been interpreted in the last half century, permits the religion-neutral government support of programs with a predominant secular purpose, provided that they do not improperly advance religion.[42] The Establishment Clause protects and ensures the separation of church and state.[43] It carries with it a very robust body of law that is frequently used in both the federal and state courts.[44] The Blaine Amendments now primarily function where the Establishment Clause does not—it forbids programs that *comply* with the principle of separation of church and state.

Today, the term "sectarian," is widely interpreted (contrary to its historical meaning) as a synonym for "religious." The Blaine Amendments thus operate to impose a per se bar against funding to *all* religious organizations. Particularly when compared with the Establishment Clause, they are broad tools that can harm a wide variety of government programs that satisfy federal constitutional concerns—including programs that involve funding for faith-based social services, leases or contracts with religious groups, and regarding certain school choice initiatives. The Blaine Amendments are therefore "the most prominent weapon," if not the only viable weapon, of those who believe in a rigid palisade between church and state.[45] The balance of this section describes some of the most important recent and ongoing cases.

A. Funding to Faith-Based Organizations

Many states have adopted programs that fund the secular charitable operations of faith-based organizations. Among other things, these organizations provide assistance to the needy, psychological counseling for abused children, substance abuse counseling, and vocational training. These sorts of programs and many others are potential subjects for Blaine Amendment suits.

One current example is the suit filed in 2007 by the Council for Secular Humanism against the state of Florida (*CSH* v. *McNeil*). A Florida statute authorizes funding for private halfway houses for recovering substance abusers. Two recipients of funds are religious organizations. The Council for Secular Humanism sued, arguing that the Blaine Amendment prohibits any government funding for "sectarian institutions."

Although the trial court held on motion for summary judgment that the Blaine Amendment applied only to schools and educational organizations, the intermediate appellate court reversed, finding the Blaine Amendment applicable against all faith-based organizations.[46] The court also suggested that the Blaine Amendment prohibits the state from contracting for social services with "sectarian entities." The case returned to the trial court for factual development.[47] A ruling against the state could prove deleterious for the many other faith-based programs in Florida and around the country.

B. Contracts and Leases

CSH v. *McNeil* involves a contract for social services. But many Blaine Amendments are not limited to social services. In fact, Blaine Amendments potentially affect any contract between the state and a religious organization.

An important example is *Barnes-Wallace* v. *City of San Diego* regarding a 2002 lease between the City of San Diego

and the Boy Scouts of America. Under the lease, the Boy Scouts would develop and maintain an urban campground for their own use and would allow others to use the campground for a small fee.[48] But California's Blaine Amendment "prohibits the City from . . . pay[ing] from any public fund whatever, or grant[ing] anything to or in aid of any religious sect, church, creed, or sectarian purpose . . . .'"[49] Thus, citizens of the city sued, arguing that the lease is in aid of a "sectarian purpose" because the Boy Scouts of America, while not a church, have "a religious element."[50]

Rather than answer the questions itself, the Ninth Circuit Court of Appeals certified a series of questions to the California Supreme Court for assistance in adjudicating the case. Namely, it wanted the California court to answer whether the leases are "aid" as defined by the Blaine Amendment and whether they benefit a "creed" or "sectarian purpose."[51] If these questions are answered in the affirmative, it would take the Blaine Amendments perhaps farther than they have ever gone to deny government aid—even that aid directed to achieving important secular ends—to religious communities.[52]

C. Religious School Choice

The Blaine Amendments have also been used repeatedly to suppress certain school choice programs. One famous example is *Witters* v. *Commission for the Blind*, which involved a state program that provided vocational assistance for blind students. Citing constitutional concerns, the state initially rejected a request to provide assistance at a religious school. The Supreme Court of the United States held that the program, even as applied to a religious applicant, is constitutional under the Federal Establishment Clause,[53] but the Washington Supreme Court later upheld the commission's decision, finding that the provision, if applied to help provide a blind student with a religious education, would violate Washington's Blaine Amendment.[54] *Witters* thus demonstrates how state Blaine Amendments sweep more broadly than the Federal Establishment Clause.

Similarly, the Supreme Court of Arizona recently held in *Cain* v. *Horne* that Arizona's Blaine Amendment prohibited Arizona's school voucher program. The court stated that, as a matter of state law, the voucher program amounts to a direct appropriation to a "private or sectarian school" and, as a result, is flatly prohibited. The court explicitly acknowledged that the voucher program would have been upheld under federal law.[55] The court thus put the scope of the Blaine Amendments plainly on display.

The Blaine Amendments have also been used to prohibit busing to religious schools.[56] It appears that South Dakota was the most recent state to try to apply its Blaine Amendment to school transportation. For years, the policy of the Hot Springs School District of South Dakota was to provide transportation for all primary and secondary students in the district, including those attending private school. In 2002, the district learned that an opinion by the state's Attorney General suggested that South Dakota's Blaine Amendment prohibits busing to religious schools. The district subsequently ceased to transport students to such schools. A group of students represented by the Becket Fund for Religious Liberty then threatened to sue, arguing that the South Dakota's Blaine Amendment is unconstitutional. About a month later, the state legislature passed a law declaring that "[s]chool districts may provide transportation to nonpublic school students if no additional public funds are expended to provide the transportation. No school district, however, is required under this section to provide transportation to nonpublic school students."[57] In another three months, the school district reinstated its old policy of busing all students, including the pupils of religious schools.[58] As a result, the case concluded without a decision on the merits.

More recently, in May 2010, Oklahoma created a scholarship program for public school students with special needs.[59] The program enables beneficiaries to use a state scholarship to obtain services and an education geared to their needs in a qualifying private school, including many religious schools. Although nearly all of the state's 541 school districts are in compliance with the law, six school districts in the greater Tulsa area opted to unilaterally violate the law. They argued that the scholarship program violates Oklahoma's Blaine Amendment. These districts apparently claim that the vast majority of private schools eligible under the program are religious, which amounts to a "use of public funds . . . for the use, benefit or support of sectarian institutions."[60] Under pressure from the Attorney General of Oklahoma, the districts voted to comply with the scholarship program and also to sue the state's Attorney General for a declaratory judgment regarding the constitutionality of the scholarship program. For a period of nearly four months, the parents in these school districts sat awaiting the districts' next move. But that never came; the districts never sought declaratory judgment. The parents allege that rather than fully comply with the scholarship law, the districts retaliated against them for seeking scholarships by reducing their awards and significantly complicating their attempts to claim benefits.[61] On April 25, 2011, the Becket Fund filed suit on behalf of the special needs students and their parents in federal district court.[62] A decision on the merits in this case, *Kimery v. Broken Arrow*, will likely need to address the constitutionality of Oklahoma's Blaine Amendment; if Oklahoma's Blaine Amendment is unconstitutional, the districts' arguments that the scholarship law violates the Blaine Amendment are of no moment.

D. Shadow Enforcement

Perhaps the most important modern effect of the Blaine Amendments is much less visible: their ability to prevent legislation from being enacted in the first place. "Shadow enforcement" is an informal enforcement mechanism that takes place in the drafting stages. The Blaine Amendments are often invoked in school board meetings and legislative offices around the country. Typically, someone in power decides that he or she wants to develop a religiously-neutral and constitutional program that would benefit the secular operations of a religious organization, assist the handicapped, or work in some other religiously-neutral manner. An opponent, or perhaps a concerned citizen, questions the constitutionality of the program on the grounds that it violates the state's Blaine Amendment. Because the drafters are often uncertain regarding the scope of their state's Blaine Amendment and are generally

inclined to read the provision literally, without any judicial gloss, the proposed program dies there without any judicial review.

III. Limits on the Blaine Amendments

Given the recent litigation and widespread effect of the Blaine Amendments, calls to limit or eliminate them entirely have grown. The two main avenues to limit or eliminate a Blaine Amendment are (a) challenging them in court as a violation of the Federal Constitution and (b) repealing them via the legislative process (either at a constitutional convention or with a referendum).

A. Constitutional Challenges to the Blaine Amendments

The history of the Blaine Amendments and their discriminatory application raises significant questions regarding their constitutionality. In particular, Blaine Amendments are vulnerable to two types of federal constitutional claims: claims under the Equal Protection Clause and claims under the Free Exercise Clause.

The Equal Protection Clause grants each person the right to "equal protection of the laws."[63] In general, if a law distinguishes between two or more classes of individuals, the government must articulate a rational basis for doing so.[64] However, if a law distinguishes among individuals on the basis of a "suspect classification," such as race, the government is held to a much higher and much more exacting standard.[65] The U.S. Supreme Court and at least nine federal circuit courts have indicated that laws that distinguish on the basis of religion are subject to this higher standard.[66]

There is no question that the Blaine Amendments classify individuals or groups on the basis of religion. Thus, the key question is whether the classification is justified under this heightened standard known as "strict scrutiny." Most states attempt to justify their Blaine Amendments on the ground that they further the principle of separation of church and state. But Blaine Amendments are an unusually blunt instrument for accomplishing this goal. They do not merely prevent religious organizations from misusing funds in violation of the state's anti-establishment interests; rather, they disqualify *all* religious groups from receiving *any* government funds, regardless of their purpose. Moreover, the discriminatory history of the Blaine Amendments reveals that they were enacted not as a means of protecting the separation of church and state but as a means of suppressing particular minority religious groups. And, as the Supreme Court has explained, a law enacted with discriminatory intent is problematic under the Equal Protection Clause even if it is no longer applied with discriminatory intent.[67] Thus, the Blaine Amendments face serious problems under an equal protection analysis.

The Blaine Amendments are also suspect under the Free Exercise Clause.[68] At a minimum, the Free Exercise Clause prohibits the government from discriminating against or targeting religion for special disfavor.[69] Arguably, this is just what the Blaine Amendments do. Although the Free Exercise Clause does not require the government to fund certain types of religious activities—such as the training of ministers[70]—it likely prohibits the government from disqualifying all religious groups from funding merely because of their religious status.

In light of these potential constitutional infirmities, it is not surprising that a plurality opinion of the Supreme Court of the United States has strongly suggested that the Blaine Amendments might be unconstitutional.[71] But no court has yet squarely struck down a Blaine Amendment as unconstitutional. Why not?

Despite a number of recent constitutional challenges to the Blaine Amendments, most courts have attempted not to decide the issue, likely not wanting to call into question the constitutional provisions in forty states, many of which are well over one hundred years old. *Bush* v. *Holmes* is a case in point. There, Florida created a scholarship program for students in "failing" public schools.[72] Under this program, students were given the option of choosing a different public school or receiving a subsidy to attend a private school. The program was challenged on Blaine Amendment grounds and, in 2004, a state intermediate appellate court held it unconstitutional with regard to students who wish to use the scholarship to attend private schools.[73] According to the court, the Blaine Amendment "prohibits the use of state funds either 'directly or indirectly in aid of' not only churches, religions, and sects, but any sectarian institution."[74]

The Florida Supreme Court affirmed the decision in 2006 on state constitutional grounds unrelated to the Blaine Amendment.[75] By deciding the case on alternative grounds, the court was able to avoid the federal constitutional issues surrounding the Blaine Amendment. It was also able to avoid review by the U.S. Supreme Court, which, in light of its comments in *Mitchell* and Justice Breyer's comments dissenting in *Zelman*,[76] would have likely wanted to review a decision resting squarely on a Blaine Amendment. Had the Florida Supreme Court not relied on alternative legal grounds, its decision likely would have either expressly relied on the Blaine Amendment to find Florida's scholarship program unconstitutional or would have stricken the Blaine Amendment on federal legal grounds.

To the best of my knowledge, only two state high courts—Washington and Kentucky—have expressly addressed the constitutionality of their Blaine Amendments.

After the U.S. Supreme Court held that Washington's program to provide vocational assistance for blind students may be applied to religious students attending religious schools, the Washington Supreme Court held in *Witters* v. *Commission for the Blind* that doing so would violate Washington's Blaine Amendment. Unlike most other courts that resolved litigation on Blaine Amendment grounds, the Washington court explored its Blaine Amendment's constitutionality.[77]

The Supreme Court of Washington first addressed the Free Exercise Clause. Curiously, it concluded that because the student-applicant was not required by the state to violate any religious belief, the Free Exercise Clause was not implicated.[78] But numerous cases hold that the Free Exercise Clause is implicated not just when the government forces someone to violate their religious beliefs, but also when the government burdens specific religious practices.[79]

The court then briefly considered the Equal Protection Clause. The court reasoned that "the state has a compelling interest in maintaining the strict separation of church and state,"

and therefore "the applicant's individual interest in receiving a religious education must . . . give way to the state's greater need to uphold its constitution."[80] The court did not engage in a traditional equal protection analysis, which would have started by asking whether religion is a suspect classification and defining the standard by which the government's actions would be judged. Nor did it make any attempt to justify the Blaine Amendment's discriminatory history or effect.

The Kentucky Supreme Court appears to be the only other court to consider and uphold the constitutionality of its Blaine Amendment. The case arose in 2006 when the Kentucky legislature appropriated $10 million for the construction of a new pharmacy school on the campus of the University of the Cumberlands, a private Baptist university. Shortly thereafter, some taxpayers and special interest groups filed suit seeking to have the appropriations ruled unconstitutional. In 2010, the Kentucky Supreme Court so held, finding that the appropriation violated Kentucky's Blaine Amendment: "[T]he Pharmacy School appropriation clearly violates Section 189 of the Kentucky Constitution because it is an allocation of public funds for educational purposes to a 'church, sectarian or denominational school.'"[81]

As the court explained: The state constitution "is *unyielding* as to where public funds can be used for educational purposes," and "church, sectarian or denominational school[s]" are *absolutely barred* from receiving state funds, regardless of the secular motives and purposes for which they wish to use those funds.[82] Indeed, as the court put it, "the intent [of the Blaine Amendment] was to prohibit *all* public funding of sectarian or religious colleges" for no reason other than the fact that they are "sectarian or religious."[83]

The court devotes considerable space in its decision to arguing that its Blaine Amendment does not violate either the Free Exercise Clause or the Equal Protection Clause.[84] The court dismissed the equal protection argument simply by noting that the author of the Blaine Amendment apparently harbored no animus towards Catholics.[85] Even if true, the court did not consider the present discriminatory *application* of the Blaine Amendment. Moreover, the court gave short shrift to significant evidence that the Kentucky Blaine was motivated by anti-Catholic sentiment.[86] The court stated that the author of Kentucky's Blaine Amendment himself had clean hands. Even if true, the virulently anti-Catholic social and political climate, largely ignored by the court, is relevant.

With regard to free exercise, the Kentucky court, much like the Washington court before it, relied almost exclusively on the state's interest in avoiding an establishment of religion. Once again, no attempt was made to argue that the state's antiestablishment concerns justify discrimination against, or the targeting of, religion. Nor did the court distinguish prior free exercise cases that establish a nondiscrimination principle and a prohibition against the targeting of religion.

In light of the Supreme Court's statements about the Blaine Amendments in the past, it seems probable that if it gets a case that squarely depends upon the constitutionality of a Blaine Amendment, the Court's treatment of the Blaine Amendment will be different than that of Washington and Kentucky.[87] But, given shadow enforcement and the desire of courts to dodge the federal constitutional questions implicit in any Blaine Amendment challenge, these cases are few and far between. As the Blaine Amendments gain more attention and the school choice movement more velocity, the cases will likely increase in frequency and the Court's review of the questions will inch closer.

B. Legislative Repeals

Given the difficulties associated with constitutional challenges, opponents of the Blaine Amendments are increasingly turning their attention to legislative repeal efforts. But this is not an entirely new strategy. At least three states have asked their voters to decide whether to remove their state's Blaine Amendment from the constitution. One attempt was successful, one was not, and one is pending until the 2012 elections.

In 1967, New York held a constitutional convention with the objective of rewriting its constitution. Many at the convention wanted to amend the Blaine Amendment in some manner, although they were sharply divided as to whether to repeal the Blaine Amendment or make it stronger. Many were happy with the current language and wanted to leave it untouched. The proponents of repeal eventually won the day and also ensured that the entire constitution would be presented to the voters as a package, rather than allowing voters to vote on Blaine Amendment repeal separately. That move outraged many, including every major newspaper in the state. The decision to wrap the repeal of the Blaine Amendment into a vote on the entire constitution was seen by many as a fatal strike against the proposed constitution. Voters ultimately rejected it by a three-to-one margin.[88]

In 1973, Louisiana's constitution had two Blaine Amendments. One barred state resources from going (directly or indirectly) to any religious organization while the other barred state support of "any private or sectarian school."[89] Blaine repeal was a contentious issue at the state's 1973-1974 constitutional convention, which ultimately decided to omit the Blaine Amendments from the proposed constitution. However, perhaps learning from New York's results, the delegates did not present voters with an all-or-nothing proposition. They allowed the voters to choose between two versions of the new article on education (one with a Blaine Amendment and one without). The voters opted for the simpler version, which lacked a Blaine Amendment.[90]

The new constitution replaced the Blaine Amendments with an explicit affirmation of the principle of separation of church and state, incorporating language from the First Amendment of the Federal Constitution into Louisiana's constitution.[91] To this day, Article 1, section 8, of Louisiana's constitution reads: "No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof." The delegates at the constitutional convention were familiar with contemporary church-state decisions by the Supreme Court and discussed them explicitly on the convention floor. The delegates decided that the federal standard was adequate to protect both church and state, and to allow both

to flourish; they preferred that standard to the stricter one that was then in the state's constitution.[92]

Following in Louisiana's footsteps, three states have recently discussed the possibility of repealing their Blaine Amendments via a state referendum. In 2010, legislators in Georgia and Florida, frustrated by recent court decisions under the Blaine Amendments, introduced bills proposing repeal. The approach used in Georgia's bill was quite similar to the approach adopted by the Louisiana delegates in 1974. It proposed replacing Georgia's Blaine Amendment with the following language: "Except as required by the First Amendment of the United States Constitution, no individual or entity shall be discriminated against or banned from receiving public funding on the basis of religious identity or belief."[93] This rhetoric seems to explain that opponents of the Blaine Amendments seek to end religious discrimination rather than separation of church and state.

Florida's 2010 legislative campaign failed. It attracted severe opposition from teachers unions who attacked the bill as a "voucher bill" designed to kill public education. Opponents of the bill did not address the Blaine Amendments' sordid history or justify its modern applications. Rather, they wanted to make the bill a referendum on public education. It appears that their efforts were successful in keeping the bill off the legislative floor.

In 2011, legislators in Florida tried again and were successful. The bill passed the Florida House of Representatives by an 85-31 margin and the Florida Senate by a 26-10 margin.[94] The bill would replace Florida's Blaine Amendment with the following: "Except to the extent required by the First Amendment to the United States Constitution, neither the government nor any agent of the government may deny to any individual or entity the benefits of any program, funding, or other support on the basis of religious identity or belief."[95]

Florida's voters will be asked whether to approve the Blaine repeal measure and this new constitutional language at the ballot box during the 2012 election season. A 60% majority is required to approve the measure.[96]

At the time of this writing, similar bills are making their way through Missouri's Legislature, and bills in Pennsylvania and Nevada implicate their Blaine Amendments. It is still too early in the legislative process to meaningfully assess those bills.

The 2010 bills in both Florida and Georgia performed well in committee hearings but were stalled before getting to their respective Floors. Legislators in Florida probably owe much of their success in 2011 to their effort highlight the civil rights and anti-discrimination aspects of their bill. Legislators and constituent groups in Georgia and other states have indicated an interest in trying to advance Blaine repeal again at some time in the future. Florida's legislative victory and coming popular campaign will probably galvanize those efforts. The other states will presumably benefit from focusing discussions about the bill on civil rights, anti-discrimination, and all of the modern non-educational applications of the Blaine Amendments.

Conclusion

The Blaine Amendments carry with them a great deal of historical and political baggage. They were neither adopted nor interpreted in a vacuum. Rather, they were written by people who desired to stifle a religious community, and opponents assert that now they are used to stifle all religious communities. The Blaine Amendments arguably do harm religious communities by denying government funding to religious individuals and institutions not because the funding advances religion, but solely on the basis of the religious identity of the beneficiaries. In the modern pluralistic era, it is arguably more appropriate for the law to decide important questions like this based on action, merit, and principle, rather than identity. But numerous cases demonstrate that the Blaine Amendments appear more focused on identity than any of these other concerns. And to the extent the Blaine Amendments are motivated by a desire to ensure the separation of church and state, they are much broader than necessary to accomplish their objective.

It seems likely that the Supreme Court of the United States will one day have the opportunity to assess the constitutionality of these laws. But there is no Blaine Amendment case currently poised to go to the Court and none of the cases in live litigation squarely presents the constitutionality Blaine Amendments as a singular legal issue. Accordingly, that day is probably still far off.

Legislative repeal seems to be a viable shorter-term solution for opponents of Blaine Amendments in some states. Florida's legislature passed its Blaine repeal by a wide margin. But it likely faces a difficult battle as supporters try to gain 60% support from the electorate. To be successful, it and other Blaine repeal efforts will have to be well-funded and maintain control of the rhetorical debate from the beginning. As explained above, the Blaine Amendments are not all about school choice, and in some states like Florida, not about school choice at all. If the opponents of Blaine Amendment repeal manage to make it just another school choice initiative, the chances of getting legislative and/or voter approval seems slim. But if Blaine Amendment repeal is about civil rights, nondiscrimination, and the role of law in a pluralistic society, its prospects seem far more promising.

Endnotes

1 In the case of territories and other federal lands, which have no constitutions, Blaine provisions often exist in their organic documents or statutes. A list of Blaine Amendment citations follows:

States: (**1**) Ala. Const. art. XIV, § 263; (**2**) Alaska Const. art. VII, § 1; (**3**) Ariz. Const. art. II, § 12; *id.* art. IX, § 10; *id.* art. XX, § 7; (**4**) Ark. Const. art. XIV, § 2; (**5**) Cal. Const. art. IX, §§ 8, 9(f); *id.* art. XVI, § 5; (**6**) Colo. Const. art. IX, §§ 7,8; (**7**) Del. Const. art. X, § 3; (**8**) Fla. Const. art I, § 3; (**9**) Ga. Const. art. I, § 2, ¶ VII; (**10**) Haw. Const. art X, § 1; (**11**) Idaho Const. art. 9, §§ 5, 6; (**12**) Ill. Const. art. X, § 3; (**13**) Ind. Const. art. 1, § 6; (**14**) Kan. Const. art. VI, § 6; (**15**) Ky. Const. § 189; (**16**) Mass. Const. amends. 18, 48; (**17**) Mich. Const. art. I, § 4; *id.* art. VIII, § 2; (**18**) Minn. Const. art I, § 16; *id.* art. XIII, § 2; (**19**) Miss. Const. art. IV, § 66; *id.* art. VIII, § 208; (**20**) Mo. Const. art. I, § 7; *id.* art. IX, § 8; (**21**) Mont. Const. art. X, § 6; (**22**) Neb. Const. art. VII, § 11; (**23**) Nev. Const. art. XI, §§ 2, 9, 10; (**24**) N.H. Const. pt. 2, art. 83; (**25**) N.M. Const. art. XII, § 3; *id.* art. XXI, § 4; (**26**) N.Y. Const. art. XI, § 3; (**27**) N.D. Const. art. VIII, §§ 1, 5; (**28**) Ohio Const. art. VI, § 2; (**29**) Okla. Const. art. I, § 5; *id.* art. II, § 5; *id.* art. XI, § 5; (**30**) Or. Const. art. I, § 5; (**31**) Pa. Const. art. 3, §§ 15, 29; (**32**) S.C. Const. art XI, § 4; (**33**) S.D. Const. art. VI, § 3; *id.* art. VIII, § 16; *id.* art. 22, § 4; (**34**) Tex. Const. art. I, § 7; *id.* art. VII, § 5(c); (**35**) Utah Const. art. 1, § 4; *id.* art. 3, § 4; *id.* art. X, §§ 1, 9; (**36**) Va. Const. art. IV, § 16, *id.* art. VIII, §§ 10, 11; (**37**) Wash. Const. art. I, § 11; *id.* art. IX, § 4;

id. art. XXVI, § 4; (**38**) W. Va. Const. art. III, § 15; (**39**) Wis. Const. art 1, § 18; *id.* art. X, §§ 3, 6; (**40**) Wyo. Const. art. I, § 19; *id.* art. III, § 36; *id.* art. VII, §§ 8, 12; *id.* art. XXI, § 28.

Other United States jurisdictions: (**41-American Samoa**) Am. Sam. art. 1, § 15, (**42-District of Columbia**) D.C. Code §§ 38-1802.04, 44-715; (**43-Puerto Rico**) R.R. Const. art. II, § 5; (**44-United States Virgin Islands**) 17 V.I.C. § 191.

2 *See*, *e.g.*, Bybee & Newton, *infra* note 20; Viteritti, *infra* note 13; Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 First Amendment L. Rev. 45 (2004);); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. & Pub. Pol'y 551 (2003); Philip Hamburger, Separation of Church and State 322-25, 335 (2002).

3 Mitchell v. Helms, 530 U.S. 793, 828 (2000); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 720-21 (2002) (Breyer, J., dissenting) (chronicling the history of the Blaine Amendments).

4 Oscar Handlin, Boston's Immigrants, 1790-1880: A Study in Acculturation 37-48 (1991).

5 Roger Daniels, Coming to America: a history of immigration and ethnicity in American life 140 (2002); Linda Dowling Almeida, Irish immigrants in New York City, 1945-1995 2 (2001); *see also* Diane Ravitch, The Great School Wars: A History of the New York City Public Schools 27 (2000); Noah Feldman, Divided by G[-]d 63 (2005).

6 Ravitch, *supra* note 5 at 27-29.

7 For example, the New York Free School Society, founded in 1805 as one of the first common schools in the United States, had as one of its "primary object[s], . . . to inculcate the sublime truths of religion and morality contained in the Holy Scriptures." Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. Davis L. Rev. 843, 851 (2009) (citing William Oland Bourne, History of the Public School Society of the City of New York 6-7, 636-44 (William Wood & Co. 1870)) (alterations in Green's article).

8 Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 502-03 (2003).

9 Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 304.

10 Rosemary C. Salmone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 Yale L. & Pol'y Rev. 169, 174 n.19 (1996); Phyllis Schlafly, *How the Government Influences our Culture*, 102 Nw. U. L. Rev. 491, 491 (2008).

11 Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

12 Michael Dehaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*¸ 11 S. Cal. Interdisc. L.J. 219, 243 (2002).

13 *See*, *e.g.*, Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 146-57 (1999); Michael Dehaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. Cal. Interdisc. L.J. 291, 233-244 (2002); Feldman, *supra* note 5, at 61-71; *see generally* Ray Allen Billington, The Protestant Crusade: 1800-1860 (1963).

14 John Thomas Scharf, 3 History of Maryland: From the Earliest Period to the Present Day 249 (1879); *see also* Michael F. Holt, *The Politics of Impatience: The Origins of Know Nothingism*, 60 J. Am. Hist. 309, 311 (1973); Billington, *supra* note 13.

15 For example, the American Protective Association, the ideological heirs to the Know-Nothings, would adopt a series of oaths similar in tone to those of the Know-Nothings. Oath number four read as follows:

> I do most solemnly promise and swear that I will always, to the utmost of my ability, labor, plead and wage a continuous warfare against ignorance and fanaticism; that I will use my utmost power to strike the shackles and chains of blind obedience to the Roman Catholic Church from the hampered and bound consciences of a priest-ridden and church-oppressed people; that I will never allow any one, a member of the Roman Catholic Church, to become a member of this order, I knowing him to be such; that I will use my influence to promote the interest of all Protestants everywhere in the world that I may be; that I will not employ a Roman Catholic in any capacity if I can procure the services of a Protestant.

Humphrey J. Desmond, The A.P.A. Movement, A Sketch 36 (1912).

16 Billington, *supra* note 13, at 289-314, 380-89.

17 Ted Gottfried, Millard Fillmore 81 (2007).

18 President Grant was previously a member of the American Party and thus sworn to fight to keep Catholics and foreigners from elected office. *See*, *e.g.*, Ulysses S. Grant, Personal Memoirs ch. XVI (1999) (with Geoffrey Perret). In 1875, while President and speaking to the Army of the Tennessee, predicted that absent an amendment to the constitution, we were headed for a war with "superstition, ambition, and ignorance," a reference to the Catholic Church. Ulysses Simpson Grant, Words of our Hero 31 (Jeremiah Chaplin ed.) (1886). Many have questioned what appears to be prejudicial actions against other religious minorities, such as Jews. *See*, *e.g.*, Leonard Dinnerstein, Antisemitism in America 32 (1995); *but see* American Jewish Historical Society, 17 American Jewish Historical Quarterly 71-80 (1909) (chronicling the incident extensively and then dismissing the incident as an aberration in an otherwise consistent record of tolerance for Jews).

19 4 Cong. Rec. 175 (1875).

20 4 Cong. Rec. 175 (1875) (emphasis added); *see also* Jay S. Bybee & David W. Newton, *Of Orphans and Vouchers: Nevada's "Little Blaine Amendment" and the Future of Religious Participation in Public Programs*, 2 Nev. L.J. 551, 551 (2002).

21 4 Cong. Rec. 175 (1875); Carl Zollmann, Church and School in the American Law 7 (1918).

22 Mitchell v. Helms, 530 U.S. 793, 828 (2000).

23 4 Cong. Rec. 5192 (1876); 4 Cong. Rec. 5595 (1876) (28 senators voted for the amendment, 16 against, and 27 abstained).

24 4 Cong. Rec. 5585, 87, 88 (1876).

25 4 Cong. Rec. 5589 (1876).

26 *See*, *e.g.*, 19 Cong. Rec. 4615 (1888); 20 Cong. Rec. 433-34 (1889); 33 Cong. Rec. 97 (1900); 33 Cong. Rec. 6121 (1900).

27 There are currently forty states with Blaine Amendments. *See supra* note 1. Louisiana deleted both of its Blaine Amendments in 1974. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 514 n.95 (2003); *infra* notes 87-89 and accompanying text.

28 Pfeiffer v. Board of Education of City of Detroit, 77 N.W. 250, 252-53 (Mich. 1898).

29 State v. Scheve, 93 N.W. 169, 171-71 (Neb. 1903).

30 Billard v. Board of Education, 76 P. 422 (Kan. 1904).

31 Hackett v. Brooksville Graded School Dist., 87 S.W. 792, 794 (Ky. 1905).

32 Church v. Bullock, 109 S.W. 115 (Tex. 1908).

33 Wilkerson v. City of Rome, 110 S.E. 895 (Ga. 1922).

34 Evans v. Selma Union High School Dist. of Fresno County, 222 P. 801 (Cal. 1924).

35 Kaplan v. Independent School Dist. of Virginia, 214 N.W. 18 (Minn. 1927).

36 People ex rel. Vollmar v. Stanley, 255 P. 610, 617 (Colo. 1927).

37 *Hackett*, 87 S.W. at 794.

38 State v. District Board of School Dist. No. 8 of City of Edgerton, 44 N.W. 967, 973 (Wis. 1890). The other state was Illinois. People ex rel. Ring v. Board of Education of Dist. 24, 92 N.E. 251 (Ill. 1910). Louisiana struck down the use of the King James Bible because it is offensive to Jews but would have upheld it as against Catholics. The court declared: "[T]he court will not concern itself with the differences, or alleged errors, in the different translations of the Christian Bible, or the Bibles of the Christians, we cannot conclude that plaintiff Marston or his children would have their consciences violated by the reading of the Bible, or of the offering of the Lord's Prayer, which prayer is contained in all versions or translations of the New Testament." Herold v. Parish Board of School Directors, 68 So. 116, 119 (La. 1915).

39 *District Board*, 44 N.W. at 973.

40 *See Wilkerson*, 110 S.E. at 903 ("Illinois [is] the only state in the Union which puts the constitutional padlock on the Bible in the public schools." (internal citation omitted)).

41 Mitchell v. Helms, 530 U.S. 793, 828-29 (2000).

42 In 1947, the Supreme Court of the United States held in *Everson* v. *Board of Education* that the Establishment Clause of the Federal Constitution is incorporated into the Fourteenth Amendment and therefore applies to the states. Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1 (1947). That decision forever changed the legal landscape in church-state jurisprudence by bringing a great many more topics within the jurisdiction of the federal judiciary. Of particular importance to the Blaine Amendments, public education, which is operated by the states and local districts, would now be the subject of lawsuits in the federal courts. Less than one year after *Everson*, the Supreme Court used the Establishment Clause to strike a program in which religious teachers provided thirty minutes of weekly religious instruction in the public schools. McCollum v. Board of Ed. of School Dist. No. 71, 333 U.S. 203 (1948). In 1962, the Court prohibited organized daily prayer recitation in the public schools despite that the prayer was non-denominational and the state did not compel participation over the objections of a student or his parents. Engel v. Vitale, 370 U.S. 421 (1962). In 1963, the Court ruled unconstitutional organized daily Bible reading in the public schools. School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963). In 1968, the Court dramatically expanded Article III standing requirements as they related to Establishment Clause cases, thus enabling significantly more alleged Establishment Clause violations into the federal courts. Flast v. Cohen, 392 U.S. 83 (1968). And in 1971, the Court prohibited state governments from subsidizing the salaries of secular teachers in private religious schools. Lemon v. Kurtzman, 403 U.S. 602 (1971). These decisions superseded much Blaine Amendment jurisprudence that had developed over the prior century. In many instances, it completed obviated the Blaine Amendments, for they would no longer be necessary to resort to state law to keep state funds out of "sectarian" hands when the proposed government program violates the principle of separation of church and state. The Blaine Amendments would only continue to be useful with regard to those programs that are compliant with separation.

43 As the Establishment Clause developed as a source of robust protection of the separation of church and state, litigants turned increasingly to the Establishment Clause rather than the Blaine Amendments. The nature of the Blaine Amendment claims changed as well. Litigants began to use the Blaine Amendments as state versions of the Establishment Clause and a small, but surprising, number of state courts would expressly declare that their Blaine Amendments are coextensive with the Establishment Clause.

During the same period of time, popular sentiment regarding the proper degree of separation between church and state changed. This is evidenced, in part, by a change in the adjudication of church-state questions. It was previously fairly common for appellate courts to declare explicitly that the United States is a Christian country founded on Christian values and therefore conclude that Bible reading in the schools, if designed to promote neutral Christian morality, is perfectly acceptable. This became unthinkable in the later third of the twentieth century. The objective of the principle of separation of church and state (enforced via the Federal Establishment Clause) morphed from preventing state-established religion to a prohibition against state financing of the religious mission of religious organizations. *See generally* Board of Ed. of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968); Tilton v. Richardson, 403 U.S. 672 (1971); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Bowen v. Kendrick, 487 U.S. 589 (1988); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

44 Interestingly, the frequency of Blaine Amendment claims actually increased following *Everson*. An informal survey of cases involving Blaine Amendments indentified seventy such cases in the years prior to 1947 (which amounts to roughly one case per year) whereas I indentified 115 such cases during the years 1947 through 2000 (roughly two cases per year). The increase is likely partially due to increasing litigiousness in the American populous. But much of the increase is misleading because many of those cases had a very heavy Establishment Clause feel and emphasis. As I noted above, *supra* note 43, the function of the Blaine Amendments changed dramatically over that period such that trying to compare the pre-*Everson* cases with the post-*Everson* cases becomes a lot like comparing apples and oranges.

45 Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, And Charitable Choice*, 83 Denv. U. L. Rev. 57, 62 (2005); *see also* Eric W. Treene, The Grand Finale is Just the Beginning: School Choice and the Coming Battle Over Blaine Amendments, http://www.fed-soc.org/publications/pubid.272/pub_detail.asp (last visited Dec. 10, 2010).

46 Council for Secular Humanism, Inc. v. McNeil, 44 So.3d 112, 116 (Fla. Dist. Ct. App. 2010).

47 *Id.* at 121. The intermediate appellate court also certified the following question: "Whether the [Blaine Amendment] in Article I, Section 3 of the Florida constitution prohibits the state from contracting for the provision of necessary social services by religious or sectarian entities?" The question seems to assume, as the court held, that the Blaine Amendment applies to all faith-based organizations but invited the Florida Supreme Court to hold that it does not impact contracts for due consideration. Review of certified questions in the State of Florida is discretionary and the Florida Supreme Court declined to accept jurisdiction. McNeil v. Council for Secular Humanism, Inc., 41 So.3d 215 (Fla. 2010).

48 Barnes-Wallace v. City Of San Diego, 607 F.3d 1167, 1172-73 (9th Cir. 2010).

49 *Id.* at 1176; Cal. Const. art. XVI § 5.

50 *Barnes-Wallace* 607 F.3d at 1171, 76.

51 The full text of the certified questions is as follows:

> 1. Do the leases interfere with the free exercise and enjoyment of religion by granting preference for a religious organization in violation of the No Preference Clause in article I, section 4 of the California Constitution?
>
> 2. Are the leases "aid" for purposes of the [Blaine Amendment] of article XVI, section 5 of the California Constitution?
>
> 3. If the leases are aid, are they benefitting a "creed" or "sectarian purpose" in violation of the [Blaine Amendment]?

Id. at 1170.

52 Surprisingly, the California Supreme Court has now twice declined to answer the certified questions. Perhaps this is because the court recognized that a ruling against the Boy Scouts could be seen by the Supreme Court as an affront to religious liberty. The California Supreme Court's most recent refusal, issued October 13, 2010, was issued without commentary or explanation. It says only the following: "The renewed request, made pursuant to California Rules of Court, rule 8.548, for this court to decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit is denied." Barnes-Wallace v. City Of San Diego, No. S185299 (Cal. Oct. 13, 2010), *available at* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1951827&doc_no=S185299.

53 Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986).

54 Witters v. Commission for the Blind, 771 P.2d 1119 (Wash. 1989).

55 Cain v. Horne, 202 P.3d 1178, 1181-85 (Ariz. 2009); *contra* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

56 *See*, *e.g.*, Epeldi v. Engelking, 488 P.2d 860 (Idaho 1971).

57 Pucket v. Hot Springs School Dist. No. 23-2, 526 F.3d 1151, 1155 (8th Cir. 2008).

58 *Id.* at 1156.

59 Lindsey Nicole Henry Scholarship for Students with Disabilities Program Act, Okla. Stat. 70, § 13-101.1, *et seq.*

60 *See* Position Statement of the Jenks School District With Regard to HB 3393, *available at* http://www.jenksps.org/pages/uploaded_files/HB3393Position%20statement.pdf.

61 Complaint at 45-54, Kimery v. Broken Arrow, No. 04:11-cv-249 (N.D. Okla. filed Apr. 25, 2011).

62 *Id.* I should note that I am listed as plaintiffs' counsel in this case.

63 U.S. Const. amend. XIV, § 1.

64 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439

(1985).

65 City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

66 The following decisions expressly indicate that religion is a "suspect classification": Abcarian v. McDonald, 617 F.3d 931, 938 (7th Cir. 2010); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010); Cornerstone Christian Schools v. University Interscholastic League, 563 F.3d 127, 139 (5th Cir. 2009); Giarratano v. Johnson ,521 F.3d 298, 303 (4th Cir. 2008); Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 816 (8th Cir. 2008); Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001); Tolchin v. Supreme Court of the State of N.J., 111 F.3d 1099, 1114 (3d Cir. 1997); Pinnacle Nursing Home v. Axelrod, 928 F.2d 1306, 1317 (2d Cir. 1991); United States v. Batchelder, 442 U.S. 114, 125 n. 9 (1979) ("The Equal Protection Clause prohibits selective enforcement based on an unjustifiable standard such as race, religion, or other arbitrary classification."). The Sixth Circuit has held repeatedly that "religious freedom" as a "fundamental right" and thus subjecting violations thereof to strict scrutiny. *See*, *e.g.*, Harbin-Bey v. Rutter, 420 F.3d 571, 576 (6th Cir. 2005).

67 Hunter v. Underwood, 471 U.S. 222 (1985).

68 U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*.") (emphasis added).

69 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (Alito, J.).

70 Locke v. Davey, 540 U.S. 712 (2004).

71 Mitchell v. Helms, 530 U.S. 793, 828-29 (2000) (plurality opinion) ("Opposition to aid to 'sectarian' schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'") (noting that the legal doctrine regarding "pervasively sectarian" schools was "born of bigotry [and] should be buried now."); *see also Locke*, 540 U.S. at 723 n.7 (finding that the constitutional "provision in question is not a Blaine Amendment.").

72 The Opportunity Scholarship Program was signed into law by Governor Jeb Bush in 1999. It remains in operation for students who wish to transfer from one public school to another public school. For more information on the program currently in effect, see the Florida Department of Education's website at http://www.floridaschoolchoice.org/information/osp/ (last visited Dec. 16, 2010).

73 *See id.*

74 Bush v. Holmes, 886 So.2d 340, 358-59 (Fla. Dist. Ct. App. 2004).

75 Bush v. Holmes, 919 So.2d 392, 413 (Fla. 2006).

76 536 U.S. 639, 720-21 (2002). *See supra* note 3.

77 Witters v. Commission for the Blind, 771 P.2d 1119, 1121 (Wash. 1989).

78 *Id.* at 1123.

79 *See supra* note 67.

80 *Witters*, 771 P.2d at 1123.

81 University of Cumberlands v. Pennybacker, 308 S.W.3d 668, 671, 673-79 (Ky. 2010).

82 *Id.* at 673, 674-75 (emphasis added).

83 *Id.* at 676 (emphasis added).

84 *Id.* at 679-82.

85 *Id.* at 682.

86 The court acknowledged that Kentucky saw its share of anti-Catholic virulence, making explicit mention of the "Bloody Monday" riots in Louisville in 1855, which saw the death of twenty-two Catholic immigrants at the hands of an angry mob. *Id.* at 681 & n.12.

87 *See supra* notes 3 & 69.

88 Henrik N. Dullea, Charter revision in the Empire State: the politics of New York's 1967 Constitutional Convention 217, 231-32, 240, 262-32, 326-28, 335 (1997); Peter J. Galie, Ordered Liberty: A Constitutional History of New York 325-27 (1996).

89 La. Const. art IV, § 8 (1921) (repealed 1975) ("No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such . . . .); La. Const. art XII, § 13 (1921) (repealed 1975) ("No public funds shall be used for the support of any private or sectarian school").

90 Jackie Ducote, *The Education Article of the Louisiana Constitution*, 62 La. L. Rev. 117, 117-18, 128-29 (2001).

91 Lee Hargrave, *Limits on Borrowing and Donations in the Louisiana Constitution Of 1975*, 62 La. L. Rev. 137, 171-72 (2001). The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

92 *See id.*

93 H.R. 567, 2009-2010 Leg. Sess. (Ga 2010), *available at* http://www.legis.ga.gov/legis/2009_10/sum/hr567.htm.

94 The Florida Senate, CS/HJR 1471: Religious Freedom, http://www.flsenate.gov/Session/Bill/2011/1471. The bill, HJR 1471, was sponsored by Representatives Scott Plakon and Stephen Precourt in the House and led by Senator Thad Altman in the Senate. *Id.*

95 The Florida Senate, CS/HJR 1471, http://www.flsenate.gov/Session/Bill/2011/1471/BillText/c1/HTML. The Becket Fund was closely involved in the legislative process. We provided expert drafting assistance and other guidance to legislators. Additionally, I testified in support of the bill.

96 House of Representatives Staff Analysis, CS/HJR 1471: Religious Freedom 1, http://www.flsenate.gov/Session/Bill/2011/1471/Analyses/1kDmOQXmIt5DEIfaTgFeUIQBE50=|7/Public/Bills/1400-1499/1471/Analysis/h1471c.JDC.PDF.